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No. 84-1217

In the Supreme Court of the United States

OCTOBER TERM, 1984

STERLING DRUG, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals upheld a Federal Trade Commission order on grounds not invoked by the agency.

2. Whether a false, deceptive and unsubstantiated advertising claim that a product has been proved therapeutically superior to other brands is protected speech under either the First Amendment to the Constitution or the Federal Trade Commission Act, 15 U.S.C. 45(c).

3. Whether the court of appeals properly applied the substantial evidence standard when it failed to disturb the Commission's determinations regarding the weight of the evidence.

4. Whether the Commission's remedial order is reasonably related to the violations found.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 741 F.2d 1146. The final order and opinion of the Federal Trade Commission (Pet. App. 32a-126a) is reported at 102 F.T.C. 744. The Commission's order denying a petition for reconsideration (Pet. App. 127a-134a) is reported at 102 F.T.C. 1329. The initial decision of the administrative law judge is reported at 102 F.T.C. 405.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1984. A petition for rehearing was denied on October 29, 1984 (Pet. App. 31a). The petition for a writ of certiorari was filed on January 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the First Amendment to the Constitution and of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, are set forth at Pet. 2.

STATEMENT

1. Petitioner manufactures, sells and distributes a number of non-prescription internal analgesic drugs, including Bayer Aspirin, Cope, and Midol. In 1973, the Federal Trade Commission (FTC or Commission) issued an administrative complaint against petitioner and its advertising agencies[1] alleging that certain advertisements for its internal analgesic products were unfair and deceptive, and therefore violated Sections 5 and 12 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45 and 52.[2]

With limited exceptions, the administrative law judge (ALJ) sustained the allegations of the complaint (see Pet. App. 3a). On appeal, the Commission agreed that petitioner had engaged in a wide variety of deceptive and unfair practices in advertising Bayer Aspirin, Cope, and Midol.[3] Specifically, the FTC concluded that petitioner had misrepresented that the analgesic superiority of Bayer and Cope over

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[1]The advertising agencies no longer are parties to this proceeding (see Pet. App. 35a).

[2]Complaints simultaneously were filed against certain of petitioner's competitors alleging similar misconduct with respect to a number of competing internal analgesic products, including Excedrin, Bufferin, and Anacin (Pet. App. 2a). Commission orders similar to the present one were largely upheld on review in those cases. See *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554 (2d Cir. 1984), cert. denied, No. 84-650 (Jan. 21, 1985); *American Home Products Corp.* v. *FTC*, 695 F.2d 681 (3d Cir. 1982).

[3]The Commission dismissed allegations concerning Vanquish and Bayer Children's Aspirin because it found that petitioner had not made the challenged claims for those products (Pet. App. 51a-56a).

competing products had been scientifically proved, or "established"; had deceptively and unfairly claimed, without a reasonable basis, that both Cope and Midol would relieve tension, and that Bayer was therapeutically superior to other brands of aspirin; and had falsely represented that Midol did not contain aspirin, that Cope's formula was unique, and that tests demonstrated Bayer's superiority to other aspirin brands with respect to purity, stability, freshness, and speed of disintegration (Pet. App. 3a-6a, 11a-12a, 39a-51a, 58a-80a, 83a-100a). In view of this record, the Commission entered a cease and desist order designed to prevent both the specific violations found and related acts and practices (*id.* 25a-30a).

The court of appeals enforced the Commission's order in its entirety (Pet. App. 1a-25a). The court observed that "the Commission's factual findings, 'if supported by evidence, shall be conclusive' " (*id.* at 6a, quoting 15 U.S.C. 45(c)). After thoroughly considering the evidentiary record, the court specifically found that the Commission's findings were grounded on substantial evidence (Pet. App. 8a-16a), thus rejecting petitioner's contention that its submissions improperly had been disregarded by the agency. Noting that "the Commission is granted wide latitude in deciding the scope of its orders" (*id.* at 16a-17a), the court also held that the Commission's cease and desist order was appropriately framed. In particular, the court agreed with the FTC's finding that the order was reasonably related to petitioner's violations and therefore properly " 'fence[d] in' " a party that had violated the FTC Act (*id.* at 17a). See *id.* at 16a-25a.

ARGUMENT

1. Petitioner's contention that the court of appeals disregarded *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), by sustaining the Commission's order on grounds not invoked by the agency (Pet. 8-12) is incorrect. In fact, the court and

the Commission *agreed* that the scope of the order was proper because petitioner's violations were serious,[4] deliberate[5] and readily "transferable,"[6] and because petitioner had a history of false advertising violations.[7] While petitioner maintains that the Commission did not label its violations deliberate (Pet. 9, 11), the FTC's factual findings lead inexorably to the conclusion that petitioner's misrepresentations were knowingly and deliberately made. See n.5, *supra*. As a result, the court simply expressed what had been left implicit in the Commission's opinion.[8] Petitioner's

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[4]The Commission noted that the violations occurred over several years (Pet. App. 108a, 112a) and involved potential health concerns (*id.* at 96a-97a). The court of appeals similarly recognized the seriousness of these health-related violations (*id.* at 18a, 19a, 23a).

[5]The Commission found that petitioner apparently was aware of the falsity of its Cope advertisements (Pet. App. 114a), and that the deceptive superiority claims for Bayer, while implied, followed plainly from petitioner's representations (*id.* at 43a, 44a, 46a). The court of appeals reiterated these findings and properly summarized them by characterizing the violations as deliberate (*id.* at 19a, 20a, 23a).

[6]In findings sustained by the court of appeals (Pet. App. 19a, 20a, 23a), the Commission held (*id.* at 108a-109a, 112a) that the misleading representations were readily transferable to other products or claims and, in fact, already had been used in the sale of more than one product.

[7]As both the Commission and the court of appeals observed, petitioner's history includes a litigated order and four subsequent consent orders (Pet. App. 19a, 108a n.54). The litigated order, *In re Sterling Drug, Inc.*, 47 F.T.C. 203, 210 (1950), was based in part on the false representation that a particular group of druggists recommended Bayer. Contrary to petitioner's assertion (Pet. 20), this violation plainly is relevant to the present case. The four consent orders were used to show only that "in no instance has an order entered against [petitioner] been limited in its scope solely to the product which was the subject of the proceeding" (Pet. App. 108a-109a n.54).

[8]Even if the court had found that the misconduct was deliberate after itself examining the record, *Chenery* would not require a remand: the addition of this factor to the others relied on by the Commission plainly would not have altered the outcome before the agency. See *Penn-Central Merger & N&W Inclusion Cases*, 389 U.S. 486, 526-527 n.14 (1968); *Time, Inc.* v. *U.S. Postal Service*, 667 F.2d 329, 335 (2d Cir. 1981).

further contention that the Commission failed to find that it had "transferred" its misleading techniques (Pet. 10) is similarly flawed: the Commission in fact concluded that petitioner made unsubstantiated claims for both Cope and Midol (see Pet. App. 112a), as well as for Bayer (see *id.* at 22a).

2. Despite petitioner's assertion to the contrary (Pet. 13, 15-17), there is a clear and settled standard for reviewing Commission determinations on the deceptive nature of commercial speech. The FTC Act specifically provides that Commission findings shall be reviewed under a "substantial evidence" standard (15 U.S.C. 45(c)), and courts of appeals consistently have applied this standard in deceptive advertising cases.[9] It is equally clear that where, as here, advertising has been found to be deceptive, the First Amendment does not prohibit its regulation. See, *e.g.*, *In re R.M.J.*, 455 U.S. 191, 202-203 (1982); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

Petitioner attempts to circumvent these principles by asserting that its advertising simply presented one side of a genuine scientific controversy. But this contention is unsupported by the record. In fact, petitioner flatly represented that Bayer's therapeutic superiority had been proved or established, a representation that the Commission found

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[9]See, *e.g.*, *American Home Products Corp.* v. *FTC*, 695 F.2d 681, 686 (3d Cir. 1982); *Litton Industries, Inc.* v. *FTC*, 676 F.2d 364, 368-369 (9th Cir. 1982); *Porter & Dietsch, Inc* v. *FTC*, 605 F.2d 294, 300 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 762-763 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978); *Fedders Corp.* v. *FTC*, 529 F.2d 1398, 1403 (2d Cir.), cert. denied, 429 U.S. 818 (1976).

to be false and deceptive because unsupported by the requisite level of scientific proof (Pet. App. 60a-73a). This misrepresentation did not constitute truthful presentation of one side of a controversy, and therefore was not entitled to First Amendment protection. Indeed, the case upon which petitioner principally relies (see Pet. 14-15, 17), *National Commission on Egg Nutrition* v. *FTC,* 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978), expressly accepted this principle; the court there reasoned that the advertiser:

> 'has done more than espouse one side of a genuine controversy. . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading'.

570 F.2d at 161 (citation omitted).[10]

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[10]Thus, the Commission in this case did not, as petitioner asserts (Pet. 16-18), attempt to resolve a scientific controversy. Instead, it engaged in its usual function of determining whether a claim about the state of scientific knowledge was a misrepresentation. See, *e.g., American Home Products Corp.* v. *FTC,* 695 F.2d at 691-693; *Porter & Dietsch, Inc.* v. *FTC,* 605 F.2d 294, 302-304 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980). *Egg Nutrition* is entirely consistent with this role. As the Commission there noted:

> It is certainly not the Commission's intention to determine in this proceeding whose interpretation of a difficult and incomplete body of scientific literature is superior. It is, however, the Commission's statutory duty to ensure that commercial advertisements intended to convince the public of the safety of a product are not deceptive, and that oversimplified expressions of opinion are not taken out of context and presented as fact in order to misrepresent the nature of a complex scientific issue * * *.

National Commission on Egg Nutrition, 88 F.T.C. 89, 182 (1976), enforced in part, 570 F.2d 157 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

3. Petitioner also contends that the Commission's findings were not supported by substantial evidence and that the Ninth Circuit's review of those findings was "unacceptably superficial" (Pet. 18-19). These factual assertions are without merit and do not warrant further review.

The gist of petitioner's substantial evidence argument is its allegation that the Commission repeatedly ignored its evidence. As the court of appeals noted, however, the Commission actually took account of petitioner's evidence, but rejected it where it was unpersuasive (Pet. App. 9a, 10a), where the opinions of the experts who offered it were entitled to relatively little weight (*id.* at 9a, 13a-14a), or where the data were flawed (*id.* at 11a). And as the court of appeals observed, it plainly is the duty of the Commission, rather than of the court, to determine the reliability of the evidence, as well as the weight to be attributed to it (*ibid.*) See, *e.g., Resort Car Rental System, Inc.* v. *FTC,* 518 F.2d 962, 963 (9th Cir.), cert. denied, 423 U.S. 827 (1975); *Bristol-Myers Co.* v. *FTC,* 185 F.2d 58, 62 (4th Cir. 1950); 16 C.F.R. 3.54(a) and (b).

Beyond this, it is apparent from the Ninth Circuit's opinion that the court made a fair assessment of the record as a whole in concluding that substantial evidence supported the Commission's findings (Pet. App. 8a-16a). That was the extent of the court's responsibility. See, *e.g., Steadman* v. *SEC,* 450 U.S. 91, 99 (1981).

4. Petitioner's final contention is that the Commission arbitrarily imposed the same relief both on it and on its competitors, Bristol-Myers Co. and American Home Products Corp., despite petitioner's allegedly lesser culpability (Pet. 21-24). In fact, however, the Commission and the court of appeals both correctly held that the facts in this case justified the Commission's order.

As the expert body with responsibility for determining what action is necessary to eliminate deceptive practices, the Commission has wide discretion in choosing an appropriate remedy. *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611-613 (1946). Courts accordingly will interfere with Commission orders only where the orders have no "reasonable relation" to the unlawful practices at issue. *Ibid.* As noted above (at 3-5), both the Commission and the court of appeals properly considered the nature of petitioner's activities in concluding that the order was in all respects "reasonably related" to petitioner's numerous serious violations of the FTC Act (see Pet. App. 18a-25a, 105a-115a). Under these circumstances, the present order does not constitute an abusive exercise of the Commission's broad remedial discretion.[11]

Furthermore, in formulating an otherwise appropriate remedy the Commission plainly was entitled to avoid disparate treatment and possible competitive inequities by ensuring that its order was essentially consistent with those entered against petitioner's competitors in the industry.

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[11]Petitioner contends, relying on *ITT Continental Baking Co.* v. *FTC*, 532 F.2d 207, 221 (2d Cir. 1976), that the Commission and the court of appeals erroneously overlooked the extent to which it had been exonerated (Pet. 23). But this reliance is misplaced. In *Continental Baking*, the court observed that "as a general rule the failure of complaint counsel to prove all of the charges originally brought should not necessarily preclude the Commission from prescribing a broad cease and desist order on the basis of the violations which it does find." 532 F.2d at 221. While the court then considered the dismissed violations, it did so only because the company in that case had been exonerated with respect to eleven out of twelve alleged misrepresentations. Here, on the other hand, petitioner was found to have committed serious violations, and the allegations of the complaint were largely sustained. Moreover, the Commission actually took the dismissed charges into account by narrowing the order to delete provisions based primarily upon those charges (Pet. App. 82a-83a, 100a-104a).

See, *e.g., Encyclopaedia Britannica, Inc.* v. *FTC,* 605 F.2d 964, 974 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *Ford Motor Co.* v. *FTC,* 547 F.2d 954, 958 (6th Cir. 1976), cert. denied, 431 U.S. 915 (1977). Indeed, the order in this case may be justified on the ground that it adheres to established industry standards. See *Grolier, Inc.* v. *FTC,* 699 F.2d 983, 989 (9th Cir.), cert. denied, 464 U.S. 891 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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